

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Per Chambers, no oral argument unless requested by the Court]

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I. INTRODUCTION.

Plaintiff Amanda Rudd (“Plaintiff”) claims an unconditional right under California law to redeem for cash a gift card issued by Defendant Borders, Inc. (“Borders”), regardless of the gift card’s balance. Yet, California law – including California Civil Code section 1749.5(b)(1), and California Business and Professions Code section 17200 (the “Unfair Competition Law” or “UCL”) – does not under any circumstances require a retailer to redeem for cash a gift card that, as here, has a balance of \$10 or more. Thus, Plaintiff’s entire action is premised on a purported statutory violation that is not a violation at all.

Plaintiff alleges violations of California Business and Professions Code section 17200 and an unjust enrichment claim. She alleges, in particular, that by violating Civil Code section 1749.5(b)(1), Borders has violated the UCL’s “unlawful” prong. However, as demonstrated herein, any failure by Borders to redeem Plaintiff’s \$20 gift card balance for cash would be entirely lawful. Furthermore, because Plaintiff cannot personally allege any viable cause of action against Borders, her effort to assert claims on behalf of an alleged class of “all other customers who received Borders Gift Cards not redeemable for cash” must also fail.

As set forth below, the entire Complaint should be dismissed with prejudice under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, inter alia, on the ground that Plaintiff cannot personally demonstrate injury in fact sufficient to establish the existence of a case or controversy as required by Article III of the United States Constitution. Alternatively, under Fed. R. Civ. P. 12(b)(6), the entire Complaint should be dismissed for failure to state a claim.

II. SUMMARY OF PLAINTIFF’S ALLEGATIONS AND FACTUAL BACKGROUND.

A. Plaintiff’s allegations.

Plaintiff filed her Complaint in this action on March 19, 2009.¹ She alleges that “[w]ithin the past four (4) years prior to the time this action was commenced,” Borders has

¹ On April 21, 2009, Defendant removed Plaintiff’s action from San Diego County Superior Court to this Court. See Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc., 984 F.2d 821, 822 (7th Cir. 1993) (“[E]ven the party which invoked federal jurisdiction may later challenge it . . .”); accord Glass v. Nat’l R.R. Passenger Corp., et al., 570 F. Supp. 2d 1180, 1181 (C.D. Cal. 2008).

1 offered for sale “Gift Cards” that provide, in part: “Gift Card is redeemable for retail
 2 merchandise only at U.S. Borders, Waldenbooks and Brentano’s stores Not returnable or
 3 redeemable for cash.” Compl. ¶ 4. Plaintiff selectively quotes a portion of California Civil
 4 Code section 1749.5(b)(1), as follows: “Any Gift Certificate² . . . is redeemable in cash for its
 5 cash value”³ Id. ¶ 6.

6 Plaintiff claims that, at some unspecified time “[w]ithin the past four (4) years,” she
 7 “received a Borders Gift Card as a gift.” Id. ¶ 5. Plaintiff’s claimed gift card does not bear an
 8 expiration date.⁴ Plaintiff further alleges that she “desired to redeem the card for cash instead of
 9 shopping at Borders stores, but in reading the Borders card noted that it could not be redeemed
 10 for cash.” Id. Thus, this entire action rests upon Plaintiff’s claim that she merely “noted” to
 11 herself that her gift card “could not be redeemed for cash,” and upon her fundamental
 12 misinterpretation of section 1749.5(b)(1) as requiring cash redemption with respect to her
 13 particular gift card. Plaintiff nevertheless purports to bring this action on behalf of herself and
 14 “all other customers who received Borders Gift Cards not redeemable for cash.” Id. ¶ 7.

15 B. Facts presented pursuant to Fed. R. Civ. p. 12(b)(1).⁵

16 Plaintiff’s claimed gift card was purchased on March 7, 2009, at a Borders store in
 17 National City, California. Declaration of Rex Spouts (“Spouts Decl.”) ¶¶ 3, 4(a). Her claimed
 18 gift card was activated upon purchase with a balance of \$20, and was non-reloadable. Id. ¶ 4(b).
 19 Borders’ records do not indicate the identity of the gift card’s purchaser. Id. ¶ 5. The gift card’s
 20 balance was checked by telephone on March 17, 2009; i.e., just two days before Plaintiff filed
 21 this action. Id. ¶ 4(c). As of that date, the gift card’s balance was still \$20. Id. Borders’
 22 records do not indicate the identity of the person who checked the gift card’s balance. Id. ¶ 5.
 23 As of May 6, 2009, the gift card’s balance remained at \$20. Id. ¶ 4(d).

24 _____
 25 ² Under California Civil Code section 1749.45, the term “gift certificate” includes “gift card.”

26 ³ As explained in Parts IV(B) and (C), section 1749.5(b)(1) does not require cash redemption
 on demand.

27 ⁴ See Borders’ Request for Judicial Notice (“RJN”) Exh. C.

28 ⁵ Borders makes a factual attack on the pleadings as permitted under Rule 12(b)(1) and,
 therefore, submits evidence in support of its Rule 12(b)(1) motion.

C. Plaintiff's near-identical cash redemption claims against American Express.

Just seven days after Plaintiff filed this action, she filed a strikingly similar gift card class action in San Diego Superior Court against American Express Travel Related Services ("American Express"). RJN Exh. D. Plaintiff's complaint against American Express contains cash redemption allegations virtually identical to those she has alleged here; *i.e.*, that "[w]ithin the past four (4) years" she "received a [gift card] as a gift," that the gift card was "[n]ot redeemable for cash," and that she "desired to redeem the card for cash, but that in reading the card noted that it could not be redeemed for cash." *Id.* ¶ 6.

III. LEGAL STANDARDS APPLICABLE TO RULE 12(b)(1) AND 12(b)(6) MOTIONS.

A. Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

In a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of proving that the court has jurisdiction to decide the claim. Thornhill Publ'n Co., Inc. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); accord Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). A plaintiff in federal court who asserts claims under California law must satisfy the requirements of Article III of the United States Constitution including the "case or controversy" requirement. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[A] threshold question in every federal case [is] whether the plaintiff has stated a 'case or controversy' between himself and the defendant within the meaning of Article III"). To demonstrate constitutional standing, a plaintiff must have alleged (1) that he or she suffered an injury in fact; (2) a causal connection between the injury and the conduct complained of – that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). An "injury in fact" under the first prong is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal citations and quotations omitted) ("By particularized, we

mean that the injury must affect the plaintiff in a personal and individual way”).⁶ To the extent state law does not recognize Plaintiff’s standing, she lacks a “legally protected interest” and, therefore, lacks Article III standing. See, e.g., Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 943, 947 (S.D. Cal. 2007) (“[T]o the extent Plaintiff has suffered no injury under state law, she also lacks standing under federal law”).

A motion to dismiss for lack of subject matter jurisdiction may be “facial or factual.” See, e.g., Sayyadinejad v. Chertoff, No. 07cv0631, 2007 U.S. Dist. LEXIS 92314, at *3 (S.D. Cal. Dec. 14, 2007) (citing Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)). In a factual attack on the pleadings, as here, “the challenger disputes the truth of the allegations” with “evidence extrinsic to the complaint,” and “the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” Safe Air, 373 F.3d at 1039 (internal citations omitted); Sayyadinejad, 2007 U.S. Dist. LEXIS 92314, at *4; see also Thornhill Publ’n Co., 594 F.2d at 733 (“Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary. . . . ‘No presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist’”) (citation omitted); accord Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

B. Rule 12(b)(6) motion to dismiss for failure to state a claim.

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint’s claims. See, e.g., Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). In Bell Atlantic

⁶ In a class action, the focus is on whether the person invoking federal jurisdiction “personally has suffered some actual or threatened injury,” Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982), and not on whether a class member allegedly has been harmed. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) (“[E]ven named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”) (internal citations omitted).

1 Corp. v. Twombly, 550 U.S. 544 (2007), the Supreme Court retired the oft-quoted
 2 Conley v. Gibson⁷ language that long-defined the standard district courts were to apply when
 3 deciding motions to dismiss. To survive a motion to dismiss, a plaintiff must allege facts that
 4 are “enough to raise his or her right to relief above the speculative level.” Twombly, 550 U.S.
 5 at 555. A motion to dismiss should be granted where the plaintiff fails to proffer “enough facts
 6 to state a claim to relief that is plausible on its face.” Id. at 570. Dismissal can be based on lack
 7 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
 8 theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). Although Rule
 9 12(b)(6) requires a court to give deference to a plaintiff’s allegations, “conclusory allegations of
 10 law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state
 11 a claim.” Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996).

12 IV. PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(1) ON
 13 THE GROUND THAT SHE FAILS TO ALLEGE “INJURY IN FACT” AS
 14 REQUIRED TO ESTABLISH ARTICLE III CONSTITUTIONAL STANDING.

15 Plaintiff’s Complaint should be dismissed in its entirety – including both its individual
 16 and class allegations – under Rule 12(b)(1) for lack of subject matter jurisdiction because her
 17 claims do not present a “Case” or “Controversy” under Article III of the Constitution.

18 Both of Plaintiff’s causes of action arise under state law. Plaintiff lacks a “legally
 19 protected interest” under either cause of action – and, therefore, cannot establish Article III
 20 “injury in fact” – as required by Cattie v. Wal-Mart Stores, supra. There are two reasons: first,
 21 Plaintiff’s entire Complaint is premised upon her faulty interpretation of Cal. Civ. Code section
 22 1749.5(b)(1) as requiring a seller of gift cards to redeem for cash on demand. Section
 23 1749.5(b)(1) contains no such requirement. Section 1749.5(b)(1) is Plaintiff’s predicate
 24 violation of law under the “unlawful” prong of Business and Professions Code section 17200.
 25 Without a violation of section 1749.5(b)(1), the allegation that Borders would not redeem

26 ⁷ Conley v. Gibson, 355 U.S. 41 (1957). In Twombly, the Court stated that the “no set of
 27 facts” language from Conley had “been questioned, criticized, and explained away long
 28 enough[.]” and that “[t]he phrase is best forgotten as an incomplete, negative gloss on an
 accepted pleading standard[.]” Twombly, 550 U.S. at 562-63.

1 Plaintiff's \$20 gift card for cash does not constitute an "unlawful" business practice.⁸ Similarly,
 2 as explained in detail herein, failure to redeem Plaintiff's \$20 gift card for cash cannot be
 3 "unfair" under section 17200 because such a practice has been expressly sanctioned by the
 4 California Legislature through section 1749.5(b)(1). Nor can it be "fraudulent" under section
 5 17200, because Borders never represented in the first instance that it would redeem Plaintiff's
 6 \$20 gift card for cash. Second, even if section 1749.5(b)(1) were somehow construed as
 7 requiring cash redemption, Plaintiff lacks standing under state law for the separate and
 8 independent reason that she utilized her gift card solely for purposes of bringing this action.
 9 The underpinnings for these two overarching conclusions are developed in the balance of this
 10 brief.

11 A. Plaintiff's first cause of action is limited to the UCL's "unlawful" prong.

12 Plaintiff's first cause of action invokes the UCL which proscribes "unfair competition,"
 13 defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive,
 14 untrue or misleading advertising and any act prohibited by [California's False Advertising
 15 Law]." Cal. Bus. & Prof. Code § 17200. Written in the disjunctive, the UCL establishes five
 16 potentially distinct theories of liability: (1) unlawful business acts or practices; (2) unfair
 17 business acts or practices; (3) fraudulent business acts or practices; (4) unfair, deceptive, untrue
 18 or misleading advertising; and (5) false advertising and related practices covered by Cal. Bus. &
 19 Prof. Code §§ 17500 – 17577.

20 Of the aforementioned five theories of liability, Plaintiff's first cause of action only
 21 invokes the first theory of liability; i.e., the UCL's "unlawful" prong. Tellingly, Plaintiff
 22 alleges – ambiguously, and in conclusory fashion – that Borders "engaged in unfair, deceptive
 23 and/or unlawful conduct in violation of [the UCL]." Compl. ¶ 16 (emphasis added).

24 Immediately thereafter, she alleges, "[s]pecifically, DEFENDANT has engaged in unlawful

25 ⁸ Plaintiff's common law claim for unjust enrichment is based on the same facts specifically
 26 pleaded with respect to her statutory claims, and is completely derivative therefrom.
 27 Accordingly, it should be subject to dismissal on the same grounds. See, e.g., Mitchell v. Nat'l
 28 Auto. & Casualty Ins. Co., 38 Cal. App. 3d 599, 606 (1974) ("When a common count is based
 upon the same facts specifically pleaded in another count which is subject to demurrer [in
 California state court], the common count is likewise subject to demurrer").

conduct by violating Civil Code section 1749.5, which requires that purchased Gift Cards be redeemable for cash.” Compl. ¶ 17 (emphasis added). The first cause of action alleges no other UCL theory of liability.⁹ Thus, at its core, Plaintiff’s Complaint challenges Borders’ failure to redeem a \$20 gift card for cash as “unlawful” under the UCL.

B. Because Civil Code section 1749.5(b)(1) does not require cash redemption, Plaintiff fails to state a claim under the UCL’s “unlawful” prong.

Plaintiff’s urged construction of section 1749.5(b)(1) is simply wrong, for several reasons. First, Plaintiff strategically ignores the full language of section 1749.5(b)(1):

(b)(1) Any gift certificate sold after January 1, 1997, is redeemable in cash for its cash value, or subject to replacement with a new gift certificate at no cost to the purchaser or holder.¹⁰

⁹ Notwithstanding her fleeting, misplaced reference in her second cause of action to an “unfair” practice, Plaintiff’s first cause of action is based solely on the UCL’s “unlawful” prong.

¹⁰ To the extent Plaintiff may argue that section 1749.5(b)(1) is ambiguous, a review of the legislative history overwhelmingly compels the conclusion that section 1749.5(b)(1) applies only to gift certificates and cards with an expiration date. And, since Plaintiff’s gift card does not contain an expiration date, the Court could decide on this basis alone that section 1749.5(b)(1) is inapplicable here. In its original form, as enacted in 1996, the text of subsection (b)(1) appeared as the second sentence in section 1749.5(a):

On or after January 1, 1997, it is unlawful for any person or entity to sell a gift certificate to a purchaser containing an expiration date. Any gift certificate sold after that date shall be redeemable in cash for its cash value, or subject to replacement with a new gift certificate at no cost to the purchaser or holder.

Section 1749.5 was prompted by a lawsuit in 1994 in which approximately 18 of the nation’s largest retailers were sued in a class action in San Diego Superior Court for alleged UCL violations based on their failure to honor gift certificates after they expired. See RJN Exh. A, pp. 25-57. The retailers settled the lawsuit by, in part, agreeing to honor their gift certificates even after they expired. See RJN Exh. A, p. 26. According to then-Assembly Member Jan Goldsmith (the bill’s author), section 1749.5 was intended to codify and expand that judicial settlement to prohibit expiration dates on all gift certificates sold in California. *Id.* Legislative history is replete with evidence that the text of what is now subsection (b)(1) is a remedy where a gift certificate contains an unlawful expiration date, including, for example:

- A July 24, 1995 letter from S. Myron Klarfeld, the attorney who brought the case against the 18 retailers in San Diego, to Hon. Jan Goldsmith stated: “We need a Bill to prohibit the use of expiration dates, or if used, that the certificates must contain language that they may be redeemed or replaced at no cost after expiration.” RJN Exh. A, p. 58.
- A December 19, 1995 memorandum from Beau Biller to Legislative Counsel requesting draft legislation “prohibiting the use of expiration dates on gift certificates, or if used, that the gift certificates must contain language that they may be redeemed or replaced at no cost after the expiration date.” RJN Exh. A, p. 59.
- On February 20, 1996, Hon. Jan Goldsmith introduced Assembly Bill 2466 which

(continued...)

Section 1749.5(b)(1) thus presents two options: either (1) cash redemption for the gift certificate's cash value, or (2) replacement with a new gift certificate. As confirmed through basic principles of statutory interpretation, and as explained in more detail in Part IV(C)(2) below, section 1749.5(b)(1) vests the issuer, not the holder, with the option whether to redeem a gift certificate for cash or to replace it. This legal conclusion is evident from the plain language of section 1749.5(b)(1), coupled with Civil Code section 1448 (providing that "[i]f an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection").

Second, the fact that section 1749.5(b)(2) – enacted after subsection (b)(1), in 2007 – provides cardholders with the right to cash redemption only if their gift cards have a cash value of less than \$10 further demonstrates that section 1749.5(b)(1) does not grant cardholders with gift card balances of \$10 or more the right to determine whether to redeem a gift card for cash or obtain a replacement card. Any other interpretation would render subsection (b)(2) superfluous, which is a prohibited statutory construction. Cal. Civ. Proc. Code § 1858 (“[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all”); Van Horn v. Watson, 45 Cal. 4th 322, 333 (2008) (“Axioms of statutory interpretation counsel us to avoid such constructions” that would render a provision useless).

Thus, only under subsection (b)(2) is the holder entitled, at his or her request, to cash for the value of the gift certificate. But Plaintiff does not allege a violation of subsection (b)(2), nor

(...continued)

proposed to make it unlawful for any person or entity to sell a gift certificate containing an expiration date unless the certificate indicated that it may be redeemed in cash for its face value or replaced with a new gift certificate after the expiration date. RJN Exh. A, pp. 3-4, 18.

- On March 27, 1996, AB 2466 was amended for the first time, but still applied only to gift certificates containing an expiration date. RJN Exh. A, pp. 5-6.
- Between April 15 and July 16, 1996, AB 2466 was amended several more times, but each amendment applied only to gift certificates containing expiration dates. RJN Exh. A, pp. 7-16, 18.
- The Bill Analysis prepared for a June 11, 1996 hearing of the Senate Committee on Judiciary stated that the bill's purpose was “to prohibit retailers from selling gift certificates which state on their face that they will not be honored after a certain date, and to require retailers to honor gift certificates after the gift certificates have expired.” RJN Exh. A, p. 20.

could she given that her card balance remains at \$20. Instead, she baldly asserts that she has “suffered injury in fact” in violation of subsection (b)(1). Compl. ¶ 19. Such conclusory allegations are unavailing, because refusal to redeem a \$20 gift card for cash is lawful under section 1749.5(b)(1). Accordingly, Plaintiff lacks standing under the UCL’s “unlawful” prong. Plaintiff, therefore, lacks a “legally protected interest” and, consequently, she cannot establish “injury in fact” sufficient to demonstrate Article III constitutional standing.

C. It is apparent that Plaintiff’s Complaint must be dismissed when the applicable statutory framework is correctly understood.

The analysis that drives the conclusion that Plaintiff’s Complaint is fatally flawed is straightforward and abides by conventional statutory construction mandates (i.e., reliance on plain language, legislative history, harmonizing related provisions, and achieving common sense results). Each mandate is evaluated in turn.

1. Standards governing statutory construction.

Statutory interpretation is a question of law. Suman v. BMW of North America, Inc., 23 Cal. App. 4th 1, 9 (1994). The fundamental task of statutory interpretation is to ascertain legislative intent so as to effectuate the purpose of the law. Cal. Civ. Proc. Code § 1859 (“In the construction of a statute the intention of the legislature . . . is to be pursued”); People v. Cruz, 13 Cal. 4th 764, 774-75 (1996).

Statutory interpretation involves a three-step analysis by the court, applied in the following order: (1) first examine the actual language of the statute; (2) if the meaning of the words is not clear, the court must refer to extrinsic evidence of intent, including legislative history; and (3) if the first two steps have failed to reveal the clear meaning of the statute, the court should apply reason, practicality, and common sense to the language at hand. Hoechst Celanese Corp. v. Franchise Tax Bd., 25 Cal. 4th 508, 519 (2001); Herman v. Los Angeles County Metro. Transp. Auth., 71 Cal. App. 4th 819, 825-26 (1999); Halberts Lumber, Inc. v. Lucky Stores, Inc., 6 Cal. App. 4th 1233, 1238-39 (1992). Here, the plain language of the statute, the legislative history behind the statute, and common sense all dictate that section 1749.5(b)(1) does not require cash back on demand for all gift cards.

2. The plain language of subsection (b)(1), together with Cal. Civ. Code section 1448, gives retailers the option whether to redeem a gift card for cash or to replace it.

As noted above, the first step in interpreting section 1749.5(b)(1) is to examine the plain language of the statute. If the language is sufficiently clear, as Borders submits is the case here, the Court need go no further. The plain language of 1749.5(b)(1) states that any gift card “is redeemable in cash for its cash value, or subject to replacement with a new gift certificate.” The word “or” connects two alternatives: a gift card can either be redeemed for cash “or” replaced with a new gift card. Although Plaintiff may argue that the plain language of 1749.5(b)(1) does not specify which party – the issuer, or its holder – has the option to redeem for cash or replace the gift card – when the statute’s plain language is viewed, as it must be, in connection with Civil Code section 1448 – it is clear that this option belongs solely to the issuer.

Under Civil Code section 1448, “[i]f an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection.” Cal. Civ. Code § 1448 (emphasis added) (titled “obligor’s right to select”); see, e.g., San Bernardino Valley Water Dev. Co. v. San Bernardino Valley Mun. Water Dist., 236 Cal. App. 2d 238, 247 (1965) (“The law specifies that alternative or disjunctive promises of a contract afford an option to the promisor to select one or more which he will perform (Civil Code, § 1448 . . .).”). Accordingly, because section 1749.5(b)(1) requires the performance of one of two acts – either cash redemption or gift certificate replacement – and the gift card’s issuer (in this instance, Borders) is the party required to perform, Borders has the right of selection. Borders, therefore, has the right to determine whether to redeem the value of a card for cash, or issue a replacement gift card; cardholders have no selection prerogatives under section 1749.5(b)(1) and, thus, do not have the election right Plaintiff claims. Accordingly, Borders may, but is not required to, redeem gift cards for cash upon request under section 1749.5(b)(1).

3. Under section 1749.5(b)(2), cardholders only have the right to cash redemption if their gift cards have a cash value of less than \$10.

Principles of statutory construction dictate that the language of section 1749.5(b)(1) be harmonized with that of section 1749.5(b)(2), which gives cardholders an unconditional right to redeem for cash if, and only if, their gift cards have a cash value of less than \$10. Van Horn, 45 Cal. 4th at 326 (“[A] statute’s language must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible”).

Section 1749.5(b)(2) provides as follows: “Notwithstanding paragraph (1), any gift certificate with a cash value of less than ten dollars (\$10) is redeemable in cash for its cash value.” Subsection (b)(2) thus stands in stark contrast with subsection (b)(1) which, as explained above, does not give the holder the right to cash, but instead gives the issuer the option of providing cash or replacing the card. If subsection (b)(1) were interpreted to require cash back on demand in all instances, as Plaintiff alleges, subsection (b)(2) would be rendered superfluous. Such an interpretation must be avoided. Cal. Civ. Proc. Code § 1858; Van Horn, 45 Cal. 4th at 333.

4. The legislative history of subsections (b)(1) and (2) confirms that Plaintiff has no right to cash redemption under subsection (b)(1) relative to her \$20 gift card.

While the plain language of section 1749.5(b)(1), in conjunction with Civil Code section 1448 and subsection (b)(2), unambiguously gives Borders – and not Plaintiff – the option of cash redemption or card replacement, the legislative history of sections 1749.5(b)(1) and (b)(2) provides further evidence in support of this interpretation. This history evidences a clear legislative intent that controls the interpretation of the statute. See supra, Part IV(C)(1).

Importantly, the legislative history of the most recent amendment to 1749.5, subsection (b)(2), conclusively demonstrates the Legislature’s intent. In 2007, as explained by the Legislative Counsel’s Digest, Senator Corbett introduced an amendment to “existing law [that] provides that any gift certificate . . . is redeemable in cash or subject to replacement with a new gift certificate.” RJN Exh. B, p. 68 (discussing SB 250). The Digest further explained that

1 “[t]his bill would allow any gift certificate with a cash value of less than \$20 to be redeemed in
 2 cash for its cash value.”¹¹ Id. The import of the proposed amendment was to retain the general
 3 provision giving the cash redemption or replacement option to retailers relative to most gift
 4 cards, simply moving it from section (b) to subsection (b)(1), and to add a provision for gift
 5 cards with balances of less than \$20 at subsection (b)(2). Id. at pp. 68-69.

6 The Assembly Committee on Business and Professions (the “Committee”) issued an
 7 analysis of this bill, clarifying that prior to the enactment of SB 250, gift card holders never had
 8 the right to cash on demand:

9 Under current law, . . . [a] store can refuse to give the remaining
 10 value of the gift card back in cash no matter how small the value
 left on the card.

11 Id. at p. 71 (emphasis added); see also id. at pp. 62-64, 66. Consistent with this analysis, the
 12 Committee noted in a hearing on SB 250, that the California Retailers Association opposed the
 13 bill because “the option offered (under current law) to cash out a gift certificate or issue a new
 14 gift card is a business decision that should be left to the individual business.” Id. at p. 76. The
 15 Committee explained that, without a requirement for cash back on demand with respect to cards
 16 with small balances, individuals with low balances often end up forfeiting the remaining amount
 17 because they cannot buy anything in the store for the remaining value on the card. Id. at pp. 71,
 18 75. SB 250 remedies this problem because “consumers will be able to redeem the remaining
 19 value of their gift card in cash when the value drops below \$20.” Id. (emphasis added). This
 20 legislative history makes it clear that the bill simply provided for cash redemption upon request
 21 with respect to small card balances (i.e., less than \$20 when the bill was first introduced, and
 22 less than \$10 as enacted). For gift card balances of \$10 or more, including Plaintiff’s \$20 card
 23 balance, the law giving retailers the option of cash redemption or card replacement remains
 24 unchanged and Borders can lawfully “refuse to give the remaining value of the gift card back in
 25 cash.” Id.

26 ¹¹ Subsection (b)(2) as enacted narrows the cash back exception from gift cards with balances
 27 of less than \$20, to those with less than \$10 balances. The legislative history indicates that this
 28 revision was made as a compromise in response to concerns from certain lobbying groups.
 RJN Exh. B, pp. 77, 79.

In addition, the lobbying history of this amendment is replete with statements regarding how the cash back provision operated before the Legislature provided for cash redemption upon request with respect to gift cards with balances of less than \$10:

- “Currently stores can refuse to give consumers the remaining value of their gift cards in cash.” RJN Exh. B, p. 72 (Letter to Assembly Business and Professions Committee from Congress of California Seniors).
- “Current law provides that retailers have the option of redeeming gift certificates for cash or issuing a new gift certificate.” RJN Exh. B, p. 73 (Memo from California Chamber of Commerce to Members of Assembly Committee on Business & Professions).
- “The law currently provides that retailers have the option to cash out a gift certificate or issue a new gift certificate or gift card[.]” RJN Exh. B, p. 74 (Memo from California Retailers Assoc. to Members, Assembly Business and Profession Committee).

These analyses – regarding how the law operated before it was amended in 2007 to provide for cash redemption with respect to gift cards with small balances – are instructive. Clearly, retailers had and have the option of either redeeming a card for cash, or exchanging it for a new card. With the enactment of subsection (b)(2), cash redemption upon request is mandatory for gift cards with balances of less than \$10.

In addition to the most recent amendment to section 1749.5 adding subsection (b)(2) effective in 2008, section 1749.5 has been amended four times. The legislative history behind the first amendment in particular, in 1997, provides further confirmation that retailers do not have an obligation to provide cash back on demand. The most significant evidence of legislative intent on this issue is an opinion from the Legislative Counsel of California (“Legislative Counsel”) that is squarely on point. See Cal. Ass’n of Psychology Providers v. Cal. Hosp. Ass’n, 51 Cal. 3d 1, 17 (1990) (holding that Legislative Counsel opinions are entitled to “great weight.”)¹² Mr. Jan Goldsmith, the Assemblyman who authored

¹² In California Association of Psychology Providers, the California Supreme Court considered an opinion of the Legislative Counsel in construing a statute. The Court held that opinions of the Legislative Counsel are “particularly compelling . . . since they are prepared to assist the Legislature in its consideration of pending legislation.” Id.; see also Barratt Am., Inc. v. City of Rancho Cucamonga, 37 Cal. 4th 685, 697 (2005) (relying on opinion of Legislative Counsel in construing statute because it has “great persuasive weight”); Pac. Lumber Co. v. State Water

(continued...)

the original section 1749.5, requested an opinion from Legislative Counsel, asking: “Does this legislation require that a merchant cash out or redeem a consumer[’]s gift certificate in cash whenever it is presented?” RJN Exh. A, p. 28 (January 9, 1997). Legislative Counsel responded unequivocally with its opinion on January 11, 1997: “[Section 1749.5] does not require a merchant to redeem a gift certificate in cash whenever it is presented by a consumer.” RJN Exh. A, p. 29 (emphasis added).

In arriving at this conclusion, Legislative Counsel analyzed the purpose of the statute, and further relied upon Civil Code section 1448 and the statute’s plain language to effectuate legislative intent. Legislative Counsel first noted that the purpose of section 1749.5 “is to protect retail consumers by imposing an obligation on merchants and other issuers to honor the certificates they have issued (see Analysis, Senate Judiciary Committee, A.B. 2466, May 9, 1996) [RJN Exh. A, p. 28].” *Id.* at p. 30. Accordingly, Legislative Counsel stated:

We do not think the Legislature intended to give the purchaser or holder of a gift certificate the ability to automatically receive cash upon presentation of the certificate. Such a construction would effectively render meaningless the concept of a gift certificate, since it could be redeemed in cash at any time after purchase.

Id. Second, Legislative Counsel relied on Civil Code section 1448, explained in more detail in Part IV(C)(2), *supra*, in conjunction with the statute’s plain language, to bolster this conclusion. Because Civil Code section 1448 provides that the obligor is the party vested with the right to select between the performance of two acts, Legislative Counsel opined that section 1749.5 “allows the merchant or other issuer to choose one of the available options to meet his or her obligation.” *Id.* (emphasis added). Accordingly, this opinion by Legislative Counsel that is entitled to “great weight” firmly concluded that section 1749.5 “does not require a merchant to redeem a gift certificate in cash whenever it is presented by a consumer.” RJN Exh. A, p. 31.

(...continued)
Res. Control Bd., 37 Cal. 4th 921, 939 (2006) (“Opinions of Legislative Counsel . . . are entitled to great weight when courts attempt to discern legislative intent.”).

5. Reason, practicality and common sense support interpreting section 1749.5(b)(1) as not requiring cash redemption for all gift cards.

Although the plain language and legislative history of section 1749.5(b)(1) leave no room for doubt as to section 1749.5(b)(1)'s interpretation, under the third prong of statutory interpretation, the Court may apply reason, practicality, common sense and public policy as a final interpretation aid. Herman, 71 Cal. App. 4th at 826 (citation omitted). Here, it is patently unreasonable to read section 1749.5(b)(1) to mandate cash redemption of all gift cards on demand. Retailers undertake an expense in administering gift card programs. They bear this burden because holders will then use the cards in their stores to purchase merchandise, thereby allowing the retailers to recoup their initial expense. Under Plaintiff's interpretation of the statute, retailers would be required to bear this expense of the gift card program, but without the benefit of the holder spending the gift card in their stores. This interpretation would transform the gift card into a debit card with unlimited application. The purpose of section 1749.5 was to protect consumers by eliminating expiration dates – not to transform retailers into banks or ATM machines. Reason, practicality and common sense support Borders' interpretation of the statute that retailers are not required to redeem gift certificates for cash on demand by the holder, unless the gift card's balance is under \$10.

D. Plaintiff fails to state a claim under the UCL's "unfair" prong.

As indicated herein, Plaintiff's first cause of action only alleges violations of the UCL's "unlawful" prong. Regardless, Plaintiff's cash redemption allegations fail to state a claim for an "unfair" business practice under the UCL. While the precise definition of "unfair" in consumer cases is unsettled under California law, under Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1264-73 (2006), conduct alleged to be "unfair" under the UCL is assessed under two possible definitions: (1) the challenged conduct must either (a) "offend[] an established public policy or [be] immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers;" or (b) be "tethered to specific constitutional, statutory or regulatory provisions." Id. On the "facts" alleged, Plaintiff cannot personally meet either standard.

First, it cannot possibly violate established public policy or be substantially injurious to a consumer where, as here, section 1749.5(b)(1) does not require cash redemption on demand with respect to a \$20 gift card. For the same reason, Plaintiff fails to allege any “specific constitutional, statutory or regulatory provisions” that Borders violated with respect to Plaintiff’s \$20 gift card. Consequently, Plaintiff fails to satisfy either definition of “unfair” conduct under the UCL.

Moreover, the Legislature has expressly addressed the circumstances under which retailers should be required to redeem gift certificates for cash, and has determined that a retailer need only (1) redeem or replace, at the retailer’s option, gift certificates with expiration dates, and (2) redeem a gift certificate for cash when its balance is less than \$10. Cal. Civ. Code §§ 1749.5(b)(1)-(2). Thus, Plaintiff may not make an end run around the statutory scheme enacted by the Legislature by recasting Borders’ policy as unfair. Cel-Tech Commc’ns v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 182 (1999) (if the Legislature has permitted the underlying conduct, the “courts may not override that determination,” and a plaintiff may not “plead around an absolute bar to relief by recasting the cause of action as one for unfair competition”); see also Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1160 (2000) (“[W]here the allegedly unfair business practice has been authorized by the Legislature, no factual or equitable inquiry need be made, as the court can decide the matter entirely on the law.”); Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505 (1999) (“[A] business practice cannot be unfair if it is permitted by law.”).

Plaintiff may not override the will of the Legislature by alleging that her inability to redeem her \$20 gift card for cash is somehow “unfair.” As a consequence, Plaintiff has not suffered “injury in fact” or “lost money or property” within the meaning of the “unfair” prong of section 17200. Accordingly, Plaintiff lacks a “legally protected interest” and, therefore, “injury in fact” sufficient to establish Article III standing.

E. Plaintiff fails to state a claim under the UCL’s “fraudulent” prong.

Again, Plaintiff’s first cause of action only alleges violations of the UCL’s “unlawful” prong. That said, the notion that Borders’ gift card disclaimer regarding cash redemption

1 vis-à-vis Plaintiff's \$20 gift card violates the UCL's "fraudulent" prong is easily disposed of.
 2 See, e.g., Van Ness v. Blue Cross of Cal., 87 Cal. App. 4th 364, 376 (2001) (affirming dismissal
 3 of UCL claim based upon defendant health plan's purported failure to pay for medical services
 4 on grounds that defendant's fee schedule was unambiguously disclosed); Shvarts v. Budget
 5 Group, Inc., 81 Cal. App. 4th 1153, 1157-60 (2000) (affirming dismissal of plaintiff car renter's
 6 claim that car rental company acted unfairly and fraudulently under UCL by applying refueling
 7 charges for rental cars returned without full gas tanks, in part because the rates were disclosed in
 8 the rental agreement); Payne v. United Cal. Bank, 23 Cal. App. 3d 850, 856 (1972). Here,
 9 Plaintiff expressly admits she was not in any way misled into believing that Borders would
 10 redeem her gift card for cash. See Compl. ¶ 5 ("Plaintiff desired to redeem the card for cash
 11 instead of shopping at Borders stores, but in reading the Borders card noted that it could not be
 12 redeemed for cash."); see, e.g., Caro v. Proctor & Gamble Co., 18 Cal. App. 4th 644, 663 (1993)
 13 (affirming trial court's determination denying class certification in UCL / False Advertising
 14 Law action where the class representative testified that he never was fooled into thinking that
 15 defendant's orange juice carton contained fresh juice). Thus, Plaintiff cannot state a claim
 16 under the UCL's "fraudulent" prong with respect to her \$20 gift card. As a result, Plaintiff has
 17 not suffered "injury in fact" or "lost money or property" within the meaning of the "fraudulent"
 18 prong of section 17200. Accordingly, Plaintiff lacks a "legally protected interest" and,
 19 therefore, "injury in fact" sufficient to establish Article III standing.

20 F. Plaintiff lacks standing under any UCL theory because she fails to allege facts
 21 sufficient to demonstrate "injury in fact" or "lost money or property."

22 Even if section 1749.5(b)(1) did require cash redemption on demand (which it plainly
 23 does not), Plaintiff still lacks standing because she has not alleged facts sufficient to
 24 demonstrate either that she suffered "injury in fact" or that she "lost money or property as a
 25 result of . . . unfair competition." See Cal. Bus. & Prof. Code § 17204 (a plaintiff must allege
 26 both "injury in fact" and "lost money or property" due to unfair competition in order to establish
 27 standing under the UCL). "The phrase 'as a result of' [in the UCL] in its plain and ordinary
 28 sense means 'caused by' and requires a showing of a causal connection or reliance on the

alleged misrepresentation.” Hall v. Time, Inc., 158 Cal. App. 4th 847, 852, 855 (2008) (no standing where, even if plaintiff suffered injury in fact, plaintiff made no causation showing); see also Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (named plaintiffs, who failed to allege they saw, read or relied on false or misleading ads, lacked standing under the UCL which requires proof of actual reliance and causation).

In Walker v. GEICO General Ins. Co., 558 F.3d 1025, 1027 (9th Cir. 2009), the Ninth Circuit adopted the general holding in Buckland v. Threshold Enters. Ltd., 155 Cal. App. 4th 798 (2007), that “the import of the [‘lost money or property’] requirement is to limit standing to individuals who suffer losses of money or property that are eligible for restitution.” Walker, 558 F.2d at 1027 (quoting Buckland, 155 Cal. App. 4th at 817). By so adopting, the Ninth Circuit established that the “lost money or property” requirement is congruent with eligibility for restitution. In Walker, the Ninth Circuit further expressly agreed with the district court’s extensive analysis of the “history and purpose” of the UCL’s standing requirements. Id. Through that analysis, the district court found “that the ‘loss of money or property’ required for UCL standing should be construed identically to the ‘lost money or property’ California courts require for [Business and Professions Code] section 17203.” Walker v. USAA Casualty Ins. Co., 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007). The district court then cited Korea Supply v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149-50 (2003), for California’s interpretation of the loss of money or property requirement for section 17203 as requiring that the plaintiff “have either prior possession or a vested legal interest in the money or property lost.” Id. The import of the Ninth Circuit’s adoption of Buckland and agreement with the district court’s analysis is that a plaintiff seeking any relief under the UCL (whether restitution or injunctive relief, or both) must show loss of money or property for purposes of restitution by alleging either prior possession or a vested legal interest in money or property in the defendant’s possession.

Here, Plaintiff does not allege either theory of restitution for purposes of her cash redemption claim, nor can she. First, Plaintiff did not expend money to purchase the Borders card at issue, rather she alleges that she “received” it “as a gift.” Compl. ¶ 5. Thus, she does

1 not and cannot assert that Borders possesses any money she previously possessed. Second,
 2 Plaintiff cannot claim that she has a vested interest in any money Borders possesses because, as
 3 explained above, section 1749.5(b)(1) does not require retailers to provide cash back on demand
 4 of the holder of a gift card with a balance of \$10 or more. Accordingly, under either theory of
 5 restitution, Plaintiff has not “lost money or property.”

6 Moreover, “[t]he mere purchase of a product for the purpose of establishing standing to
 7 sue is not ‘injury in fact’ or ‘loss of money or property’ within the meaning of Proposition 64
 8 [amending §§ 17204, 17535].” See William L. Stern, Cal. Practice Guide: Cal. Bus. & Prof.
 9 Code § 17200 (The Rutter Group 2008) ¶ 7:22.2 (citing Buckland, 155 Cal. App. 4th at 808 (“In
 10 the case of fraudulent misrepresentation, actual reliance occurs only when the plaintiff reposes
 11 confidence in the *truth* of the relevant representation, and acts upon this confidence”) (emphasis
 12 supplied)). In Buckland, the plaintiff suspected the defendants’ advertising representations were
 13 false and misleading, and she bought their products “solely to pursue litigation upon the
 14 vindication of her suspicions.” Id.; see also Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d
 15 939, 947-48 (S.D. Cal. 2007) (where plaintiff failed to specifically allege that she relied on
 16 defendant’s advertising when she purchased defendant’s linens, only alleged reliance in
 17 conclusory fashion, was represented by four different law firms, and filed a nationwide lawsuit
 18 “a mere eleven days after making her purchase,” the Court concluded that the plaintiff had not
 19 suffered any actual harm and that “the possibility that Plaintiff did not rely on the allegedly false
 20 advertising when making her purchase is thus more than purely theoretical”).

21 And so it is here. As Borders’ Rule 12(b)(1) evidence unmistakably demonstrates,
 22 Plaintiff utilized her gift card for the sole purpose of bringing this lawsuit. Plaintiff’s gift card
 23 was purchased on March 7, 2009 – i.e., a mere twelve days before Plaintiff filed this lawsuit –
 24 and was activated upon purchase with a balance of \$20. Though Plaintiff does not allege when
 25 she “received” the card “as a gift,” the gift card’s balance was checked by telephone on
 26 March 17, 2009; i.e., a mere two days before Plaintiff filed suit. Plaintiff does not allege that
 27 she ever used or attempted to use her claimed gift card to purchase retail merchandise. To the
 28 contrary, she has never had any interest at all in using her gift card to shop at Borders stores.

1 Compl. ¶ 5. Indeed, Borders' records confirm that the original \$20 balance on Plaintiff's gift
 2 card remains untapped. Spouts Decl. ¶ 4(d). Instead, Plaintiff claims she "desires to redeem the
 3 card for cash." Id. Remarkably, she nevertheless fails to allege that she ever attempted to
 4 redeem the gift card's \$20 balance for cash.

5 Moreover, as noted in Part II(B) herein, Plaintiff filed a gift card class action in San
 6 Diego Superior Court against American Express just one week after filing this action alleging
 7 virtually identical cash redemption claims. RJN Exh. D ¶ 6. Such formulaic claims in both this
 8 action and the action against American Express reveal classic hallmarks of a plaintiff who, as in
 9 Buckland and Cattie, has not suffered any actual harm but who, nevertheless, has purposefully
 10 utilized a defendant's product for the sole objective of bringing suit. Thus, Plaintiff has neither
 11 suffered "injury in fact" nor "lost money or property." Accordingly, for this separate and
 12 independent reason, Plaintiff lacks UCL standing and, in turn, Article III standing.

13 V. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(6) FOR
 14 FAILURE TO STATE A CLAIM.

15 Not only does Plaintiff's Complaint fail under Rule 12(b)(1) because she lacks standing,
 16 but it further must be dismissed under Rule 12(b)(6) because it fails to state a claim upon which
 17 relief can be granted. Accepting all allegations of material fact in the Complaint as true and
 18 construing them in the light most favorable to the Plaintiff, and without regard to any of the
 19 evidence submitted by Borders in support of its Rule 12(b)(1) motion, the Complaint in its
 20 entirety – including both its individual and class allegations – fails to state a claim and must be
 21 dismissed.

22 A. Plaintiff's allegations do not state a claim for relief under the UCL.

23 1. Plaintiff's allegations do not state a claim for unlawful business practices.

24 Plaintiff first asserts that Borders engaged in unlawful conduct under the UCL by
 25 violating Civil Code section 1749.5 because a Borders gift card Plaintiff received stated that it
 26 was "not redeemable for cash." Compl. ¶¶ 4-6, 16-17. Plaintiff's allegation, however, fails to
 27 state a claim for relief and must be dismissed. As described in detail herein, section
 28 1749.5(b)(1) does not require retailers to redeem gift cards for cash on demand, unless the card

1 has a balance of less than \$10. Plaintiff fails to allege the dollar amount of her gift card, or that
 2 she requested cash redemption from Borders on a gift card with a balance of less than \$10, or
 3 that such a request was denied.¹³ She alleges only that she “noted” that her claimed gift card
 4 (whose balance she fails to allege) “could not be redeemed for cash.” Compl. ¶ 5. Thus, at
 5 minimum, Plaintiff fails to allege facts sufficient to demonstrate that her gift card balance is less
 6 than \$10 such that she is legally entitled to cash redemption upon request.¹⁴ Furthermore,
 7 consistent with the authorities cited in Part IV(C) herein (but without regard to Borders’ Rule
 8 12(b)(1) evidence), Plaintiff’s barebones allegations are insufficient to establish that she
 9 suffered “injury in fact” or “lost money or property” as a result of alleged unfair competition by
 10 Borders. Accordingly, Plaintiff’s first cause of action under the UCL alleging “unlawful”
 11 business practices fails to state a claim.

12 2. Plaintiff fails to state a claim for unfair business practices.

13 Similarly (and without regard to Borders’ Rule 12(b)(1) evidence), for the reasons stated
 14 in Parts IV(C)(3) and V(A)(1) herein, and consistent with the authorities cited in Part
 15 IV(F) herein regarding the UCL’s requirement that a plaintiff allege “injury in fact” and “lost
 16 money or property,” Plaintiff fails to state a claim with respect to the UCL’s “unfair” prong.

17 3. Plaintiff fails to state a claim for fraudulent business practices.

18 Likewise (and without regard to Borders’ Rule 12(b)(1) evidence), for the reasons stated
 19 in Parts IV(C)(4) and V(A)(1) herein, and consistent with the authorities cited in Part
 20 IV(F) herein regarding the UCL’s requirement that a plaintiff allege “injury in fact” and “lost
 21 money or property,” Plaintiff fails to state a claim with respect to the UCL’s “fraudulent” prong.

22 _____

23 ¹³ To the extent the Complaint would have the Court speculate that Plaintiff’s gift card balance
 24 is less than \$10 such that she is legally entitled to cash redemption upon request, the Court
 25 cannot so speculate. Twombly, 550 U.S. at 555 (instructing that “factual allegations must be
 26 enough to raise a right to relief above the speculative level.”). Moreover, Plaintiff is not saved
 by having pleaded legal conclusions that would support the claim where the facts pleaded are
 inconsistent with those legal conclusions. Weisbuch v. County of Los Angeles, 119 F.3d 778,
 783 n.1 (9th Cir. 1997).

27 ¹⁴ Plaintiff cannot, in observance of the good faith pleading requirements, even entertain any
 28 hope of making factual allegations that could overcome this threshold deficiency in her
 Complaint.

1 B. Plaintiff fails to state a claim for unjust enrichment.

2 Plaintiff's second cause of action alleges that Borders was "unjustly enriched by its
3 unfair and unlawful practice of refusing cash redemptions on unused card balances."
4 Compl. ¶ 22. As under her first cause of action, Plaintiff seeks "restitution" and an injunction in
5 connection with her claim for unjust enrichment. Id. ¶ 23.

6 A claim for unjust enrichment requires pleading "the receipt of a benefit and the unjust
7 retention of the benefit at the expense of another." Lectrodryer v. Seoulbank, 77 Cal. App. 4th
8 723, 726 (2000). There is a split of authority among California courts as to whether unjust
9 enrichment can be maintained as an independent cause of action or whether it is instead "merely
10 an equitable remedy." See, e.g., Parrish v. Nat'l Football League Players Ass'n, 534 F.
11 Supp. 2d 1081, 1100 (N.D. Cal. 2007) (holding that the plaintiffs failed to plead that they
12 conferred a benefit on defendants which they unjustly retained, as they did not allege that the
13 defendants received anything from plaintiffs' status as former NFL players); see also Dinosaur
14 Dev., Inc. v. White, 216 Cal. App. 3d 1310, 1314-15 (1989) (unjust enrichment is synonymous
15 with the remedy of restitution).¹⁵ Since Plaintiff cannot state a claim for restitution under the
16 UCL, her unjust enrichment claim necessarily fails.

17 VI. CONCLUSION.

18 Based on the foregoing, Borders respectfully requests that this Court grant its motion to
19 dismiss Plaintiff's entire Complaint with prejudice for lack of subject matter jurisdiction or, in
20 the alternative, for failure to state a claim.

21
22 Dated: May 12, 2009

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27 _____
28 ¹⁵ Accordingly, injunctive relief is not an appropriate remedy for unjust enrichment.

Case No. 3:09-cv-00832-BTM-NLS

CERTIFICATE OF SERVICE

I, Kathei Courtland, declare as follows:

1. I am employed in the City of Sacramento, County of Sacramento, State of California, in the office of a member of the bar of this Court at whose direction the service was made.

2. I am over the age of eighteen (18) years, and not a party to the within action.

3. My business address is Pillsbury Winthrop Shaw Pittman LLP, 400 Capitol Mall, Suite 1700, Sacramento, CA 95814.

4. On May 12, 2009, I served the document titled MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BORDERS, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT on the parties in this action as follows:

Stephen B. Morris, Esq. Morris and Associates 444 West C Street, Suite 300 San Diego, CA 92101 Telephone: (619) 239-1300 Facsimile: (619) 234-3672 Email: morris@sandiegolegal.com <i>Attorneys for Plaintiff AMANDA RUDD</i>	
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X	(VIA ELECTRONIC CASE FILING) I filed electronically the document(s) listed above, using the Court's Case Management/Electronic Case Filing (CM/ECF) service. Counsel of record are registered to file electronically with this Court and to receive copies of the documents via e-mail by the Court's Notice of Electronic Filing constituting filing and service of the document(s) listed above.
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I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of May, 2009, at Sacramento, California.



Kathei Courtland